

A ASMARA ABDUL RAHMAN v. MUSA AMAN & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
AZHAHARI KAMAL RAMLI J
[CASE NO: SDK-26PP-1-6-2018]
18 SEPTEMBER 2018

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***ELECTION:** Petition – Striking out – Application for – Whether there was failure to comply with Election Petition Rules 1954 ('Rules') – Whether r. 9 stipulate requirement that there should be separate notice of appointment for each advocate – Whether leaving only two copies of petition at office of Registrar contrary to r. 3(1) and (2) – Whether notice of petition should be published in national language in national language newspaper – Whether there was personal service of petition – Whether r. 15 complied with – Failure to state correct dates of holding of election in petition – Whether allegations of corrupt practice and bribery proved beyond reasonable doubt – Whether particulars given sufficient, unequivocal and unambiguous – Whether there was non-compliance of r. 4(1)(b), 4(2) and 4(4) – Whether defects in petition resulted in jurisdictional failure – Whether petition ought to be dismissed*

D

***ELECTION:** Petition – Striking out – Application for – Presentation of petition – Whether petition presented within 28 days from alleged corrupt practice – Whether computation of 28 days starts from date of payment or from date of publication in Gazette – Whether petitioner in breach of s. 38(1)(a) of Election Offences Act 1954 – Whether defects in petition resulted in jurisdictional failure – Whether petition ought to be dismissed*

E

***ELECTION:** Petition – Striking out – Application for – Preliminary objections raised against notice of application to strike out petition – Whether notice of application filed out of time – Whether petitioner was served with sealed copy of notice of application – Whether petitioner prejudiced – Whether there was non-compliance with court's direction – Whether r. 9 of Election Petition Rules 1954 only applies to petitioner – Whether preliminary objections dismissed*

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The first respondent was the candidate for Barisan Nasional ('BN') in the State Constituency of N42, Sungai Sibuga ('State Constituency') during the 14th General Election held on 9 May 2018. The petitioner was a candidate representing Parti Warisan Sabah ('Warisan'). The first respondent, who garnered 14,503 votes, was declared the winner whereas the petitioner garnered only 12,319 votes. The first respondent was returned as being the elected member of the State Legislative Assembly of N42 Sungai Sibuga. The petitioner filed a petition claiming, *inter alia*, for a declaration that the election for the said State Constituency be void. The petitioner claimed that an offence of bribery under s. 10(a) of the Election Offences Act 1954 ('the Act') had been committed so extensively that it affected the results of the election. The petitioner also submitted that there were corrupt practices as prescribed under s. 32(c) of the Act committed by the first respondent or

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with his knowledge or consent or by any of his agent. The first respondent filed a notice of application to strike out the petition, claiming that the petitioner failed to comply with the Election Petition Rules 1954 ('the Rules'). The petitioner raised a preliminary objection that (i) the notice of application to strike out the petition was filed out of time; (ii) the petitioner was not served with the sealed copy of the notice of application; and (iii) there was a failure by the solicitor for the respondent to comply with rr. 9 and 34 of the Rules. The substantive issues that arose were (i) whether a separate notice under r. 9 of the Rules should be filed by the petitioner if he chose to appoint more than one advocate; (ii) whether the petitioner had left only two copies of the petition at the office of the Registrar, contrary to r. 3(1) and (2) of the Rules; (iii) whether the notice published in the national language newspaper under r. 15 of the Rules must be in the national language; (iv) whether the petitioner failed to serve the petition on the first respondent personally; (v) whether the petitioner failed to comply with the requirement of s. 38(1)(a) of the Act as the Election Petition was not presented within 28 days from the alleged corrupt practice committed by the first respondent; and (vi) whether the petitioner had failed to state the correct dates of the holding of the election in the petition, and failed to give material particulars on the charge of corrupt practices, thereby failing to comply with r. 4(1)(b), 4(2) and 4(4) of the Rules. The second and third respondents also objected to the petition on the ground that there were insufficient materials in the petition against the second and third respondents, hence it was submitted that the petition against them were too vague and did not contain material facts required.

Held (allowing application; striking out petition):

- (1) The record in the case management system showed that the first respondent filed this application on 13 August 2018 and the same was sealed/verified by the Registrar on 14 August 2018. Hence, the notice of application was filed within the timeline prescribed by this court. Further, the petitioner was not prejudiced by the late service of the sealed copy of the notice of application. There was thus no non-compliance with the court's direction. As for r. 9 of the Rules, this provision only applied to the petitioner. It is expressly provided that the petitioner shall leave at the office of the Registrar, a notice signed by him of the advocates authorised by him to act on his behalf. Nowhere in r. 9 was it stated that the same requirement was extended to the first respondent. It followed that the non-filing of the notice under r. 9 of the first respondent was not fatal. Therefore, the preliminary objection raised by the petitioner was dismissed. (paras 10-15)
- (2) The petitioner had appointed two advocates to represent him in this petition but had filed only one notice of appointment of advocate under r. 9 which consists of the name of the two aforesaid advocates. Rule 9 does not restrict the number of advocates that could be

- A appointed by the petitioner. It merely states that the appointment of
an advocate must be done at the time of filing of the petition. There
is no provision in the Rules that limit the number of advocates that the
petitioner may employ. Rule 9 employs the word ‘an advocate’ which
refer to a singular person. Reading r. 9 literally, while the petitioner
may employ more than one advocate, such appointment must be done
B by filing a separate notice as provided by r. 9 for each and every
advocate. Thus, a single notice of appointment of advocate filed by the
petitioner herein was not in compliance with r. 9. (paras 19, 23 & 24)
- C (3) Rule 3(1) and (2) of the Rules makes it mandatory for the petitioner
to ‘deliver’ the petition at the office of the Registrar and requires the
petitioner to ‘leave’ two copies thereof. This must be done at the time
when the petition is being presented. As such, when the petitioner
came back to the Registry on 28 June 2018 bringing three extra copies
of the election petition, the only conclusion that could be made was
D that between 18 June 2018 and 28 June 2018 there were only two
copies of the petition left in the Registry, a clear breach of r. 3(1) and
(2). The subsequent ‘delivery’ of the additional three copies of the
election petition could not rectify the non-compliance of r. 3(2). This
strict requirement must be complied with at the time the petition was
E filed. It was obvious in the present petition that the said rules were not
complied with and ought to be struck out. (paras 33, 34 & 48)
- F (4) The petition was served on the first respondent on 28 June 2018 by
posting the notice of the presentation of the petition and the said
petition on the notice board of the High Court at Sandakan and by
posting the same in a national language newspaper under r. 15. There
was no mention in para (c) about the need of publishing the notice in
the national language, in the national language newspaper. It merely
requires that the notice be published in a national language newspaper.
Considering the fact that English is still the language used in the courts
G in Sabah and Sarawak, there was no reason why this objection should
prevail. However, r. 15 now makes it mandatory for the petitioner to
serve, or attempt to serve, the petition on the first respondent
personally under para (a). The petitioner must also then serve the
petition using any of the two modes of service under paras (b) and (c).
H Herein, there was no personal service of the petition on the first
respondent. This court was minded of the events that took place in
Sabah after the General Election on 9 May 2018 that may have
hindered any attempts to comply with r. 15(1)(a). But there must be
evidence that, at least, there was an attempt to effect personal service
on the first respondent. Otherwise it was not unreasonable to infer that
I there had been deliberate non-compliance of the rule. Due to the non-
compliance of the provisions of the Rules, the petition against the first
respondent was defective and ought to be struck out. (paras 42, 47, 48
& 49)

- (5) Section 38(1) is the general provision whereby any election petition shall be presented within 21 days of the date of publication of the result of the election in the *Gazette*. On the other hand, proviso (a) and (b)(i) and (ii) to s. 38 apply to the specific ground of avoidance of the election namely corrupt practice and illegal practice. The proviso to s. 38 must be read independently of s. 38(1), hence the word 'since the date aforesaid' which appears in proviso (a) should not be taken to mean that the filing of the petition on the ground of corruption, and specifically payment of money as in this present case, must be filed within 28 days from the date of the publication of the result of the election in the *Gazette*. The words 'within twenty eight days after the date of such payment or act' in proviso (a) makes it clear that the computation of the 28 days starts from the date of payment and not the date of publication. The absence of the word 'the date of publication in the *Gazette*' in proviso (a) shows the intention of legislative to allow proviso (a) to stand independently of s. 38(1). The petitioner pleaded that the payment of monies was made to the votes on three different dates, the last being 9 May 2018. Hence, the last date for the filing of the petition fell on 6 June 2018. Thus, when the present petition was presented on 18 June 2018, the petitioner was already in breach of s. 38(1)(a). Hence, the petition ought to be dismissed on this ground. (paras 53-55)
- (6) The polling process in Malaysia in a contested election would comprise both the advance polling (postal vote) that is carried out on an earlier date than the actual polling day and the actual polling. The Election Commission had fixed 5 May 2018 as the date for advance polling day whereas 9 May 2018 was fixed for the actual polling day. The different dates of the polling day is a material fact which form part of the many processes in the election before an official result will be declared by the returning officer. The votes obtained by the respective candidates at the advance polling and the actual polling dates will be tallied before the declaration of the winning candidate. As such, this date should be mentioned in the petition as this would reflect the whole election process that was being challenged. The reason offered by the petitioner for stating only one polling date *ie*, because the form provided in r. 4(4) does not provide for two spaces for both dates to be inserted was unacceptable. The petitioner could always modify the said form by stating the date of the advance polling and the actual polling date. The word '... or one to the like effect ...' in the said rule provides the petitioner flexibility in drafting the petition to ensure strict compliance of the rule. As such, the petition may also be struck out under this heading. (paras 58-61)
- (6)(a) In so far as the allegation of corrupt practice is concerned, it is trite that this is *quasi*-criminal in nature which requires strict requirement in the pleadings. The petitioner was required to state with precision

A such acts or instances which could be attributed to the first respondent to indicate his culpability and which he would have to verify at the hearing of the petition. The allegation of corrupt practice must be proved beyond reasonable doubt by evidence which was clear, unequivocal and unambiguous. As the matter stood, the petitioner was making vague imputations of bribery by the first respondent without giving any sufficient particulars that would enable the first respondent to answer those imputations efficiently. The petitioner had not shown any nexus between the acts of bribery and the first respondent. The petitioner's claim that he had personal knowledge that the first respondent had practiced an established system of canvassing for votes by using, giving or distributing money to induce voters to vote for the first respondent since previous general elections to secure his election to the constituency also was not supported by any material particulars. The charge against the first respondent appeared to be vague and incomplete. The petition ought to be dismissed for non-compliance of r. 4(1)(b), and r. 4(2). (paras 64, 69, 71 & 72)

(7) The petition filed herein had been subjected to close scrutiny by this court. There was nowhere in the petition that the petitioner had shown any wrongdoing by the second and third respondents throughout the election. There was no reason why the second and third respondents should be made parties in this petition. The petition was therefore defective against the second and third respondents and ought to be dismissed. The defects in the petition had resulted in a jurisdictional failure. Pursuant to s. 36(1)(a) of the Act, the first respondent had been duly returned as the member of the State Legislative Assembly N 42 Sibuga. (paras 76 & 77)

Case(s) referred to:

- Abu Backer Sidek Mohammad Zan v. Ramkarpal Singh Deo & Ors* [2014] 1 LNS 1277 HC (*refd*)
- Ahmad Jamaluddin Abd Majid v. Rafidah Aziz & Ors* [2009] 2 CLJ 785 FC (*refd*)
- G *Ahmad Ramzi Mohamad Zubir v. Hj Abdul Hadi Awang & Ors* [2009] 7 CLJ 205 HC (*refd*)
- Alexander Vincent v. Aden Denong Demong* [2006] 1 LNS 173 HC (*refd*)
- Che Ideris Mat Sin lwn. Pegawai Pengurus Pilihanraya Kawasan Parlimen P 026 Peringat & Ors (No 1)* [2001] 1 LNS 264 HC (*refd*)
- Chiew Chiu Sing v. Dato Seri Tiong King Sing* [2004] 8 CLJ 82 HC (*refd*)
- H *Chong Thain Vun v. Watson & Anor and Other Appeals* [1967] 1 LNS 29 HC (*refd*)
- Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 FC (*refd*)
- Dato' Dr Awang Adek Hussin v. Ahmad Marzuki Shaary & Ors* [2013] 1 LNS 1195 HC (*refd*)
- Dayrell Walter Entrie v. Datuk Patinggi Tan Sri Alfred Jabu Numpang* [2007] 7 CLJ 11 HC (*refd*)
- I *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57 FC (*refd*)

- Hii King Chiong v. Ting Tiong Choon* [2016] 1 LNS 1172 HC (foll) A
- Isahak Hamid v. Mustapha* [1965] 1 LNS 63 HC (refd)
- Mahdi Hasan v. Ahmad Zahid Hamidi* [2014] 1 LNS 183 HC (refd)
- Mohamad Hanafi Seman lwn. Wan Othman Wan Yusuff & Yang Lain* [2000] 3 CLJ 811 HC (refd)
- Mohamad Sazali Kamilan v. Nurul Izzah Anwar & Ors* [2013] 9 CLJ 782 HC (foll) B
- Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors* [2010] 8 CLJ 608 HC (foll)
- Redzuan Stapha v. Tuan Mazlan Tuan Mat & Ors* [2013] 1 LNS 1194 HC (refd)
- Wan Sagar Wan Embong v. Harun Taib (No 2)* [2009] 1 CLJ 457 FC (refd)
- Zulkarnaini Mohamed Noor v. Syed Omar Mohamed & Anor* [1978] 1 LNS 245 HC (refd) C
- Legislation referred to:**
- Election Offences Act 1954, ss. 10(a), 32(a), (b), (c), (d), (e), 36(1)(a), 38(1)(a), (b)(i), (ii), 42(1)
- Election Petition Rules 1954, rr. 3(1), (2), 4(1)(b), (2), (4), 9, 15(1)(a), (b), (c), 34
- Interpretation Acts 1948 and 1967, s. 17A
- For the petitioner - Majnah Abdillah & Zaleha Mohd Yusuf Pan; M/s Zakaria Ahmad & Co* D
- For the 1st respondent - Mohd Azhier Farhan Arisin; M/s FT Ahmad & Co*
- For the 2nd & 3rd respondents - Japar Esteban Nasir, Muammar Julkarnain & Abdul Fikry Jaafar Abdullah; M/s Jumahad Julkarnain & Ahmadshah*
- Reported by Suhainah Wahiduddin* E

JUDGMENT

Azhahari Kamal Ramli J:

- [1] The first respondent, Musa bin Aman, was the candidate for Barisan Nasional (BN) in the State Constituency of N42, Sungai Sibuga during the 14th General Election held on 9 May 2018. The petitioner, Asmara bin Abdul Rahman was a candidate representing Parti Warisan Sabah (Warisan), whereas one Osman bin Enting represented Parti Kebangsaan Sabah (PKS). The total number of electorate for N42 constituency was 35,454. The first respondent garnered 14,503 votes whereas the petitioner garnered 12,319 votes. Osman bin Enting only managed to secure 241 votes. The first respondent was declared the winner with a majority of 2184 votes. There were 525 rejected ballot papers and 164 ballot papers issued but not put in the ballot box. The first respondent was returned as being the elected member of the State Legislative Assembly of N42 Sungai Sibuga. F G H
- [2] The petitioner filed the petition herein on 18 June 2018 claiming the following orders:
- (a) A declaration that the election for the State Constituency of Sungai Sibuga (N42) held on 9 May 2018 is void; I

- A (b) A declaration that the first respondent, Musa bin Aman is not duly elected or ought not to have been returned;
- (c) Costs; and
- (d) Such further or other relief as the court deems fit.
- B [3] In this petition, the petitioner claims that an offence of bribery under s. 10(a) of the Election Offences Act 1954 has been committed so extensively prevailed that they may be reasonably have affected the result of the election. There were also corrupt practices as prescribed under s. 32(c) of the Election Offences Act (the Act) committed by the first respondent or with his
- C knowledge or consent or by any of his agent. Hence, the petitioner pleaded case is that there were breaches of s. 32(a) and (c) of the Act, justifying the relief sought for in this petition.
- [4] On 13 August 2018, the first respondent filed a notice of application to strike out the petition herein. The petitioner then filed a notice of
- D preliminary objection on 29 August 2018.
- [5] The striking out application is premised on the following grounds:
- (a) The petitioner failed to comply with r. 3(1) and (2) of the Election Petition Rules 1954 (the Rules);
- E (b) The petitioner failed to comply with r. 9 of the Rules;
- (c) The petitioner failed to comply with r. 15(1) of the Rules;
- (d) The petitioner failed to comply with the requirement of s. 38(1)(a) of the Act as the election petition was not presented within 28 days from the
- F alleged corrupt practice committed by the first respondent;
- (e) The petitioner is not in compliance with r. 4(1)(b), 4(2) and 4(4) of the Rules;
- [6] On the other hand, the preliminary objection raised by the petitioner
- G is founded on the following issues:
- (a) The notice of application to strike out the petition was filed out of time.
- (b) The petitioner was not served with the sealed copy of the notice of application.
- H (c) Failure by the solicitor for the respondent to comply with rr. 9 and 34 of the Rules.
- [7] I will deal with the preliminary objection first.
- [8] It was submitted by the petitioner that the first respondent has failed
- I to comply with the directions given by this court on 24 July 2018 when filing this application.

[9] The petitioner complains that he was served with the notice of application on 15 August 2018. However, this was an unsealed and undated copy of the notice. The sealed copy of the notice was only served on him on 16 August 2018 even though the same was e-mailed to his counsel on 15 August 2018. It was argued that the notice was served out of time and should be dismissed.

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[10] It must be noted that the first respondent was directed to file this application on or before 14 August 2018. However, that direction was not accompanied by an unless order which spell out the consequences if the direction was not complied with. The direction also did not set the dateline when the said notice of application must be served on the petitioner. Be that as it may the record in the case management system shows that the first respondent filed this application on 13 August 2018. The same was sealed/verified by the Registrar on 14 August 2018. Hence, I am of the opinion that the notice of application was filed within the timeline prescribed by this court.

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[11] Further, even though the sealed copy of the notice of application was served on the petitioner only on 16 August 2018 the petitioner managed to file the affidavit in opposition and served the same on the first respondent on 23 August 2018, *albeit* two days outside the timeline. In my opinion, the petitioner was not prejudiced by the late service of the sealed copy of the notice of application. He has knowledge of the same as early as 14 August 2018. The direction given by the court was not made under any of the provision of the Rules which require strict compliance thereof. Hence, based on the facts of this case, I am of the opinion that there is no non-compliance with the court's direction. I find no merit on this point.

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[12] The second preliminary objection relates to the appointment of advocates acting for the first respondent. It was submitted that the first respondent has failed to comply with r. 9 and r. 34 of the Rules with regards to the appointment of Tengku Fuad bin TA Burhanuddin, Rizwandeem Bukhary bin M Borhan, Mohd Reduan Aklee, Mohd Azhier Farhan bin Arisin and Jeyan TM Marimuthu. There is no notice of appointment of advocates by or signed by the first respondent under r. 9 filed in this petition nor the notice of acceptance of the said advocate under r. 34 been filed.

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[13] In essence, learned counsel for the petitioner argued that both rr. 9 and 34 of the Rules must be complied with, failing which the advocates on record for the first respondent have no *locus* to file this notice of application. Since there is no notice under r. 9 being filed by the first respondent, it was urged upon this court to dismiss the notice of application for non-compliance with the two rules. In support of this contention, the case of *Dato' Dr Awang Aek Hussin v. Ahmad Marzuk Shaary & Ors* [2013] 1 LNS 1195 and *Redzuan Stapha v. Tuan Mazlan Tuan Mat & Ors* [2013] 1 LNS 1194 are cited.

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A [14] Reading r. 9, I am of the view that this provision only applies to the petitioner. It is expressly provided that the petitioner shall leave at the office of the Registrar, a notice signed by him of the advocates authorised by him to act on his behalf. Nowhere in r. 9 was it stated that the same requirement is extended to the first respondent. Obviously the Legislature does not intend
B to impose the same duty on the respondent under r. 9. In my opinion, r. 9 does not apply to the first respondent. It follows that the non-filing of the notice under r. 9 by the first respondent is not fatal.

[15] Based on the aforesaid reasons, I dismiss the preliminary objection.

C [16] I will now deal with the substantive matter in the notice of application. It is well settled that the petitioner must comply strictly the mandatory requirements of the Rules, failing which the petition may be dismissed without going for trial. In the case of *Chong Thain Vun v. Watson & Anor and Other Appeals* [1967] 1 LNS 29; [1968] 1 MLJ 65 it was held that:

D the Election Petition Rules 1954 are mandatory and require strict compliance therewith. Non-compliance with the provisions of the Rule or the Election Offences Ordinance must result in a jurisdictional defect and the court has no power to entertain the petitions

E [17] In the case of *Ahmad Jamaluddin Abd Majid v. Rafidah Aziz & Ors* [2009] 2 CLJ 785, the Federal Court through Zulkefli Ahmad Makinuddin FCJ (as he then was) opined that:

[10] It is to be noted at the outset that the election judge has the jurisdiction to strike out an election petition that is defective without the need to go through the process of a full hearing. This point has been
F settled by this court following a long line of authorities in the case of *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 and recently affirmed in the case of *Wan Sagar Wan Embong v. Harun Taib* [2008] 5 CLJ 14 wherein the court ruled that a defective election petition includes the following:

- G (a) failure to comply with the mandatory requirements of r. 4(1)(b) of the EPR which require the petition to state the facts and grounds to sustain the prayers sought;
- (b) failure to relate or associate the complaints advanced with the provisions of election laws alleged to have been transgressed; and
- H (c) failure to set out the facts complying with the twin requirements of s. 32(b) of the Act so as to have a cause of action sufficient to sustain the prayers sought

[18] Based on the above statement of law, I will now deal with the substantive issues raised in this application.

Whether The Petitioner Had Failed To Comply With Rule 9 Of The Rules

I [19] The petitioner has appointed two advocates to represent him in this petition namely Puan Majnah binti Abdullah and Puan Zaleha binti Mohd Yusuf Pan. It was pointed out that the petitioner had filed one notice of appointment of advocate under r. 9 which consist of the name of the two

aforesaid advocates. It was submitted by learned counsel for the first respondent that this is a clear breach of r. 9 and insist that there should be separate notice been filed in respect of each advocate appointed by the petitioner. For the petitioner, it was submitted that r. 9 does not stipulate any requirement that there should be separate notice of appointment for each advocate. It was argued that r. 9 has been duly complied with.

[20] Rule 9 provides:

With the petition the Petitioner or Petitioners shall leave at the office of the Registrar a writing, signed by him or them, giving the name of an advocate whom he or they authorised to act as his or their advocate or stating that he or they act for himself or themselves, as the case may be, and in either case giving an address within Malaysia at which notices may be left. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force.

[21] By virtue of r. 9, the petitioner may either appoint an advocate to represent him or he may choose to act for himself. In both circumstances, the petitioner shall leave at the office of the Registrar a notice to that effect, stating the address within Malaysia at which notices may be left.

[22] The issue before this court is whether a separate notice under r. 9 should be filed by the petitioner if he chooses to appoint more than one advocates. Hence, the authorities cited by the first respondent, in support of his objection, ie, *Chiew Chiu Sing v. Dato Seri Tiong King Sing* [2004] 8 CLJ 82 and *Dayrell Walter Entrie v. Datuk Patinggi Tan Sri Alfred Jabu Numpang* [2007] 7 CLJ 11 do not support his submission.

[23] Rule 9, in my opinion, does not restrict the number of advocates that could be appointed by the petitioner. It merely states that the appointment of an advocate must be done at the time of filing of the petition. What then is the position when more than one advocate is appointed by the petitioner? The Rules is made pursuant to s. 42(1) of the Act which provides that the procedure and practice on election petition shall be regulated by the Election Petition Rules 1954. There is no provision in the Rules that limit the number of advocate that the petitioner may employ. In this respect, r. 9 employ the word “an advocate” which refer to a singular person. Reading r. 9 literally, it is my considered opinion that while the petitioner may employ more than one advocate, such appointment must be done by filing a separate notice as provided by r. 9 for each and every advocate.

[24] In the circumstances, a single notice of appointment of advocate filed by the petitioner herein is not in compliance with r. 9.

Whether The Petitioner Has Failed To Comply With Rule 3(1) And Rule 3(2) Of The Rule

[25] Learned counsel for the first respondent referred to the letter from the petitioner’s advocate dated 18 June 2018 (exh. MA1) and pointed out that the petitioner had filed seven copies of the petition and by the same letter

- A it was shown that five copies of the petition were returned to the petitioner. Hence it was submitted that the petitioner had only left two copies of the petition, contrary to r. 3(1) and (2). It was further submitted that the petitioner had also admitted in para. 12.2(a) of his affidavit in opposition that
- B (ie, the date of filing of the petition) and that only on 28 June 2018 that he had given three extra copies of the petition at the Registry.

- [26] In response, learned counsel for the first respondent admitted that only two copies of the said petition were left at the Registry at the time of filing of the petition. It was also admitted that another five copies of the petition
- C were filed on 28 June 2018. It was argued that assuming that there were only two copies of the petition left by the petitioner at the Registry, there would always be sufficient copies of the petition because the same had been e-filed and uploaded to the CMS (court management system). It was also argued that the copies of the petition which were posted on the Sandakan High Court
- D notice board and the uploaded copy which contained the verification code assigned by the CMS. Citing the case of *Abu Backer Sidek Mohammad Zan v. Ramkarpal Singh Deo & Ors* [2014] 1 LNS 1277; [2015] 1 MLRH 541, it was submitted that the r. 3(1) and 3(2) have been duly complied with. It was further submitted that when the petitioner posted the petition on the
- E Sandakan High Court notice board on 28 June 2018, a copy of the petition had already been posted by the court staff on the notice board.

[27] Rule 3 provides:

- 3(1) The presentation of an election petition shall be made by delivering it at the office of the Registrar and the Registrar or the officer of his
- F department to whom the petition is delivered shall, if required, give a receipt in the following form:

Received on the ... 20 ... at the Registry of the High Court, a petition touching the election of A.B., ... for ... purporting to be signed by ... (instate the name of Petitioners).

- G (2) There shall also be left with the petition two copies thereof.

- [28] While under sub-r. (1), the petitioner shall deliver the petition at the Registry, sub-r. (2) requires two copies of the petition to be filed left at the Registry. Reading sub-rr. (1) and (2) together, it is mandatory for the petitioner to leave the petition together with two copies thereof. In the case
- H of *Mohamad Hanafi Seman v. Wan Othman Wan Yusuff dan Lain-Lain* [2000] 3 CLJ 811; [2003] 3 MLJ 482 Zulkefli Ahmad Makinuddin J (as he then was) states that:

- I Saya berpendapat peruntukan K3(1) dan K3(2) dibaca bersama memperuntukkan kesemuanya tiga Salinan petition termasuk Salinan asal perlu ditinggalkan di Pejabat Pendaftar Mahkamah ...

[29] Further, in interpreting r. 3(2), Sulong Matjeraie J (as he then was) in the case of *Chiew Chiu Sing v. Dato Seri Tiong King Sing* [2004] 8 CLJ 82; [2005] 1 MLJ 759 held that:

Rule 3(2) clearly imposes a statutory obligation on the Petitioner to leave two copies of the petition at the office of the Registrar of the Court and if this is not fulfilled, that provides the ground for the election petition to be struck out ...

[30] The above two cases support my interpretation of r. 3(1) and 3(2) namely the petitioner is required by law to file the petition and to leave two copies of the petition with the Registrar. Altogether there must be three copies of the petition. However, in this petition, it is proven that only two copies of the petition were left in the Registry by the petitioner (see exh. MA1). This is clearly a breach of r. 3(1) and 3(2) and the petition should be struck out on this ground.

[31] It must be noted that learned counsel for the petitioner, in their submission, admitted that they had left only two copies of the petition at the High Court Registry on 18 June 2018. However, it was further submitted that on 28 June 2018, they had given three extra copies of the petition together with the notice of presentation of the petition. Hence, when the first respondent conducted the search at the Sandakan High Court Registry on 26 July 2018 there would have been five copies of the petition at that time. It was also submitted that there would always be enough copies of the petition because when the petition was presented to the Court Registry, the same was uploaded to the CMS system by the court staff. The uploaded copy of the petition was posted on the notice board of Sandakan Court.

[32] At the risk of repetition, it must be emphasised that the Election Petition Rules 1954 is the specific rule governing the practice and procedure of election petitions. Section 42(1) of the Act provides that the practice and procedure on election petition shall be regulated by the Rules. As such, the procedure in presenting an election petition must be governed by r. 3 and only when the Rules is silent on any procedure pertaining to its presentation that the court could seek assistance from the Rules of Court 2012.

[33] In this regard, r. 3(1) makes it mandatory for the petitioner to “deliver” the petition at the office of the Registrar and r. 3(2) requires the petitioner to “leave” two copies thereof. It is the responsibility of the petitioner to physically deliver the petition and at the same time he shall leave two copies thereof at the office of the Registrar. This must be done at the time when the petition is being presented. However as shown in exh. MA1, five copies of the petition were taken back by the petitioner leaving only two copies at the Registry.

[34] As such, when the petitioner came back to the Registry on 28 June 2018 bringing three extra copies of the election petition, the only conclusion that can be made is that between 18 June 2018 and 28 June 2018 there are

A only two copies of the petition left in the Registry, a clear breach of r. 3(1) and (2). In my judgment, the subsequent “delivery” of the additional three copies of the election petition cannot rectify the non-compliance of r. 3(2). This strict requirement must be complied with at the time the petition was filed.

B [35] Learned counsel for the petitioner also relied on the case of *Abu Backer Sidek Mohammad Zan v. Ramkarpal Singh Deo & Ors* (*supra*) and argued that since the court are utilising the e-filing system there would always be enough copies of the petition at the Court’s Registry. In that case, the petition was filed electronically and the court opined that the relevant provision of the Rules has to be read in keeping with the electronic regime of filing of court document and depositing of documents filed with the Registry.

C [36] However in the present petition, the petitioner chose to file the petition manually. Upon checking the physical file of this petition, it is observed that the petition does not bear the digital signature of the Senior Assistant Registrar of High Court of Sandakan nor does it contain any verification code automatically affixed in any electronic filing of court document. In fact, the acknowledgment signature of Puan Faelly Jeffrey Lanjungan the Senior Assistant Registrar, was affixed manually. It was admitted by learned counsel for the petitioner that the petition was uploaded by the court staff to the CMS. This can only be done after the same was filed by the petitioner manually.

E [37] In this respect, Ravinthran Paramaguru J in the case of *Hii King Chiong v. Ting Tiong Choon* [2016] 1 LNS 1172; [2016] MLJU 1078 opined that:

F In my view, since there is no provision in Order 63A of the Rules of Court 2012 for Court staff to electronically file documents on behalf of law firms, the question whether the Court staff in question “e-filed” the petition cannot arise. It is obvious and plain in this case that the solicitors of the Petitioners had manually filed the petition at the Court’s registry for reasons best known to themselves and the court staff had scanned the hardcopy and had merely “uploaded” it to the virtual file for ease of reference. This process cannot be equated with e-filing under Order 63A which requires “registered users” to obtain an “authentication code” from the Registrar to e-file documents ... Since the petitioner or his solicitor had chosen the manual filing method in this case, I am of the view that reliance on the case of *Abu Backer Sidek Mohammad Zan v. Ramkarpal Singh Deo & Ors* (*supra*) is unhelpful.

G [38] The fact of this present petition with regards to the filing of the petition is similar to the case of *Hii King Chiong v. Ting Tiong Choon* (*supra*). I share the same reasoning by His Lordship in that case. In my considered opinion, once the filing of the petition is done manually, the requirement under r. 3(1) and 3(2) must be complied with. In the present petition, it is obvious that the said rules were not complied with and ought to be struck out.

I

Whether The Petitioner Has Failed To Comply With Rule 15 Of The Election Petition Rules

A

[39] Rule 15 provides for the mode of service of the petition. It states that:

15(1) Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within fifteen days of the presentation of the petition, be served by the petitioner:

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(a) on the respondent personally, which shall be effected by delivering the notice and a copy of the petition to the respondent;

(b) by sending the notice and a copy of the petition by pre-paid registered post addressed to the respondent at his usual or last known place of residence or business; or

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(c) by posting a notice on the notice board of the High Court in the state in which that constituency or electoral ward is situated and by publishing a notice in a national language newspaper and in any newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented and that a copy of the petition may be obtained by the respondent free of charge on application at the office of the registrar.

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[40] The petition was served on the first respondent on 28 June 2018 by posting the notice of the presentation of the petition and the said petition on the notice board of the High Court at Sandakan and by posting the same in a national language newspaper namely Utusan Borneo and in New Sabah Times. Both newspapers are in circulation within the constituency.

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[41] The first respondent's objection on this heading is two-pronged. Firstly it was contended that the notice published in the national language newspaper ie, Utusan Borneo is in English, not in the national language. It was submitted that the notice published in the national language newspaper under r. 15 must be in the national language. According to the first respondent, it defeats all common sense and logic to publish the notice in the national language newspaper while the notice itself is in English. Secondly, it was submitted by learned counsel of the petitioner that the petitioner had failed to serve the petition on the first respondent personally before resorting to the other mode of service under r. 15(1)(b) and (c).

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[42] With regards to the first objection, I am of the opinion that there is no mention in para. (c) about the need of publishing the notice in national language in the national language newspaper. It merely requires that the notice to be published in a national language newspaper. Considering the fact that English is still the language used in the courts in Sabah and Sarawak, I see no reason why this objection should prevail.

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A [43] Citing the case of *Abu Backer Sidek Mohammad Zan (supra)* it was submitted for the petitioner that under r. 15, the petition may be served by any one of the three modes of service provided in para. (a), (b) and (c). In that case, Lee Swee Seng J states:

B [50] Rule 15(1) of the EPR allows for any one of the three modes of service of the petition as can be seen in the word “or” after r. 15(1)(b) and before (c). The legislator could have used the word “and” at the same place but quite deliberately it did not do so. I would hold that a petitioner may serve the petition by any one of the modes prescribed in rr. 15(1)(a) or (b) or (c).

C [44] However, r. 15 had been drafted in such a way that a semicolon was added at the end of para. (a) and (b) and the word “or” at the end of para. (b). This can be interpreted that para. (a) and (b) are disjunctive; however the presence of the word “or” at the end of para. (b) may also be interpreted that there must be at least two mode of service of the petition.
D This has caused an ambiguity in the interpretation of this Rules. Hence, learned counsel for the petitioner and the first respondent are taking two opposite view with regard to the proper interpretation of r. 15.

E [45] In the circumstances, it is now necessary to consider s. 17A of the Interpretations Act 1948 and 1967. It gives statutory recognition to the purposive approach in interpreting a statute (see *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; [2002] 2 MLJ 11). Section 17A reads:

F In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object

G [46] It is also settled law that in adopting purposive approach, the court is entitled to look for extrinsic aid in interpreting the statute including the Parliamentary Record or Hansard (see *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345). In proposing the amendment to r. 15, the Minister was recorded to have said as follows:

H Tuan Yang di Pertua, pada masa ini Kaedah memperuntukkan sesuatu notis atau petisyen disampaikan kepada peguam bela yang dilantik oleh pempetisyen. Kaedah ini telah banyak menimbulkan masalah di mana responden itu sendiri tidak menerima notis tersebut.

I Bagi mengatasi masalah ini, saya mencadangkan Kaedah 15 digubal semula untuk membolehkan sesuatu notis atau petisyen itu disampaikan kepada diri responden sendiri dalam tempoh 15 hari selepas petisyen itu dikemukakan dan diikuti dengan dua cara penyampaian yang lain iaitu dengan cara pos berdaftar atau dengan cara menunjukkan suatu notis di papan notis Mahkamah Tinggi di negeri yang petisyen itu dikemukakan.

Pindaan Kaedah ini memperuntukkan juga bahawa sesuatu notis petisyen seseorang pempetisyen itu hendaklah disifatkan telah diserahkan walaupun responden enggan menerimanya.

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(Hansard DR.9.9.2002 at page 67-74)

[47] The amendment was passed *via* Election Offences (Amendment) Act 2002 (Act A1177). It must be noted that words “diikuti dengan” appeared in the record of the speech after the words “... disampaikan kepada diri responden sendiri dalam tempoh 15 hari selepas petition itu dikemukakan ...” From the speech of the Minister, it is obvious that the Legislature had intended that there must be two modes of service of the petition ie, the petition must first be served on the respondent personally under para. (a); followed by any of the other two mode of service under para. (b) or (c). In my opinion r. 15 now makes it mandatory for the petitioner to serve, or attempt to serve, the petition on the first respondent personally under para. (a). The petitioner must also then serve the petition using any of the two modes of service under para. (b) and (c).

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[48] In our present case, it is obvious that there is no personal service of the petition on the first respondent. I am minded of the events that took place in Sabah after the general election on 9 May 2018 that may have hindered any attempts to comply with r. 15(1)(a). However, there must be evidence that, at least, there was an attempt to effect personal service on the first respondent. Otherwise it is not unreasonable to infer that there has been deliberate non-compliance of the rule.

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[49] I am satisfied that, due to the non-compliance of the provisions of the Election Petition Rules, as discussed above, the petition against the first respondent is defective and should be struck out.

F

Whether The Petitioner Has Failed To Comply With Section 38(1)(a) Of The Election Offences Act 1954

[50] In the petition, the petitioner had pleaded that the act of bribery, in particular payment of money, were committed on 2 May 2018, 8 May 2018 and 9 May 2018. It was submitted by learned counsel for the first respondent that under s. 38(1)(a) of the Election Offences Act, the petition must be presented at any time within 28 days after the date of such payment. The case of *Mohamad Sazali Kamilan v. Nurul Izzah Anwar & Ors* [2013] 9 CLJ 782 was cited in support of this contention.

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[51] On the other hand, learned counsel for the petitioner submitted that the payment of money was made before the publication of the result of the election. Therefore, the 21 days’ timeline under s. 38(1) should apply. Since the result of the election was gazetted on 28 May 2018 *vide* P.U(B) 333/2018, the petition was presented within the stipulated time. The case of *Mahdi Hasan v. Ahmad Zahid Hamidi* [2014] 1 LNS 183; [2014] 4 MLRH 106 was cited in support of this contention.

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A [52] Section 38(1)(a) provides as follows:

Every election petition shall be presented within twenty-one days of the date of publication of the result of the election in the *Gazette*:

Provided that:

- B (a) an election petition questioning the return or the election upon the ground of a corrupt practice and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of the person or with the privity of the person or his election agent in pursuance or in furtherance of such corrupt practice may,
- C so far as respect such corrupt practice, be presented at any time within twenty eight days after the date of such payment or act.

[53] It is trite law that the election of a candidate at any election may be avoided in a very limited circumstances under s. 32(a)-(e) of the Election Offences Act 1954. The petitioner in this petition is relying on s. 32(a) and (c) and in particular s. 10(a) of the Act. It is for this reason that s. 38(1)(a) and (b)(i) and (ii) provide different timeline for the presentation of the petition. In my opinion, s. 38(1) is the general provision whereby any election petition shall be presented within 21 days of the date of publication of the result of the election in the *Gazette*. On the other hand, proviso (a) and (b)(i) and (ii) to s. 38 apply to the specific ground of avoidance of the election namely corrupt practice and illegal practice. In my opinion, the proviso to s. 38 must be read independently of s. 38(1), hence the word “since the date aforesaid” which appears in proviso (a) should not be taken to mean that the filing of the petition on the ground of corruption, and specifically payment of money as in this present case, must be filed within 28 days from the date of the publication of the result of the election in the *Gazette*. The words “within 28 days after the date of such payment or act” in proviso (a) makes it clear that the computation of the 28 days starts from the date of payment and not the date of publication.

G [54] Hence in *Mohamad Sazali Kamilen (supra)* it was held that:

- [60] Nowhere does the section says that it refers to corrupt practice that took place after the publication of the *Gazette*. If the legislature had intended that this section is only in relation to acts after the publication in the *Gazette* then it should clearly state so in the provision. This can be seen in Section 38(1)(b)(i) of Election Offences Act which expressly states “... as respects such illegal practices be presented within the time following at any time before the expiration of 14 days immediately after the date of publication in the *Gazette*.”
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I [55] I am inclined to follow the reasoning in *Mohamad Sazali Kamilen (supra)* the absence of the word “the date of publication in the *Gazette*” in proviso (a) (unlike in proviso (b)) shows the intention of Legislative to allow proviso (a) to stand independently of s. 38(1). The petitioner pleaded that the

payment of money were made to the votes on three different dates, the last being 9 May 2018. Hence the last date for the filing of the petition fall on 6 June 2018. In the circumstances, I rule that when the present petition was presented on 18 June 2018 the petitioner was already in breach of s. 38(1)(a). Hence the petition ought to be dismissed on this ground.

Whether There Is Non-compliance With Rule 4(1)(b), 4(2) And 4(4) of the Rule Petitioner

[56] It was contended by learned counsel for the first respondent that the petitioner has failed to comply with r. 4(1)(b), 4(2) and 4(4) of the Rules. Rule 4(1)(b) provides:

4(1) An election petition shall contain the following statements:

(a) ...

(b) it shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

Rule 4(2) provides:

The petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed for drawing or copying any petition not substantially in compliance with this rule, unless otherwise ordered by the Court or Judge.

Rule 4(4) provides for the form of the petition.

[57] Firstly it was contended by learned counsel for the first respondent that the petitioner had failed to state the correct dates of the holding of the election in the petition, in that the date of the advance polling was not stated therein. In response, learned counsel for the petitioner argued that the form of the petition as required by r. 4(4) does not provide for two spaces for the two dates of the polling to be inserted; hence only one polling date was inserted in the petition ie, 9 May 2018.

[58] In this respect, I take judicial notice that the polling process in Malaysia in a contested election would comprise of both the advance polling (postal vote) and the actual polling. The advance polling will be carried out on an earlier date than the actual polling day. In so far the 14th General Election is concerned, the Election Commission had fixed 5 May 2018 as the date for advance polling day whereas 9 May 2018 was fixed for the actual polling day. These dates appeared in the notice to hold a general election to the Legislative Assembly of the State of Sabah *via* Federal Government Gazette P.U. (B) 187 dated 11 April 2018 is as follows:

... the advance polling day shall be 5 May 2018 and the polling day shall be 9 May 2018.

A [59] The importance of these dates have also been reflected in the Result of Contested Election and Statement of the Poll After the Official Addition of Votes gazetted in the Federal Government Gazette PU(B) 333 dated 28 May 2018 where it was stated that:

B ... as a result of the advance polling day on 5 May 2018 and polling day on 9 May 2018

C [60] In my opinion, the different dates of the polling day is a material fact which forms part of the many processes in the election before an official result will be declared by the returning officer (see *Isahak Hamid v. Mustapha* [1995] 1 LNS 63; [1965] 2 MLJ 18). I also take judicial notice that the votes obtained by the respective candidates at the advance polling and the actual polling dates will be tallied before the declaration of the winning candidate. As such, this date should be mentioned in the petition as this would reflect the whole election process that is being challenged. The need to state the correct date in petition had been emphasised in the case of *Zulkarnaini Mohamed Noor v. Syed Omar Mohamed & Anor* [1978] 1 LNS 245; [1979] 2 MLJ 143 where at p. 146 (MLJ), Mohamed Zahir J opined as follows:

E Thus the date describes the election and if one were to present an election petition in which the date of the election is wrongly quoted then we cannot but come to the conclusion that such election is non-existent, although we very well know that there is a mistake on the part of the petitioner. The petition has become therefore a nullity at the date of filing.

F [61] In my opinion, the reason offered by learned counsel for the petitioner for stating only one polling date ie, because the form provided in r. 4(4) does not provide for two spaces for both dates to be inserted, unacceptable. The petitioner can always modify the said form by stating the date of the advance polling and the actual polling date. In my opinion, the word "... or one to the like effect ..." in the said rule provides the petitioner flexibility in drafting the petition to ensure strict compliance of the rule. As such, I am of the opinion that the petition may also be struck out under this heading.

G [62] The first respondent then contends that the petitioner is in breach of r. 4(1)(b), 4(2) of the Rules because the petition lacks sufficient material facts to constitute the cause of action.

[63] At the outset, the present petition is founded on the following grounds:

H (a) general bribery under s. 32(a) of the Act and which have so extensively prevailed that they may be reasonably supposed to have affected the result of the said election.

I (b) corrupt practice under s. 32(c) of the Act had been committed by the first respondent or with his knowledge or consent or by any agent of the first respondent. The corrupt practices allegedly committed by the first respondent is the offence of bribery under s. 10(a) of the Act.

[64] In view of the above grounds of this petition, it is perhaps necessary to state the law in respect to the same. In so far as the allegation of “corrupt practice” is concerned, it is trite that this is a *quasi*-criminal in nature which requires strict requirement in the pleadings. The petitioner would be required to state with precision such acts or instances which can be attributed to the first respondent to indicate his culpability and which he could have to verify at the hearing of the petition. The allegation of corrupt practice (in this petition, bribery) must be proved beyond reasonable doubt by evidence which is clear, unequivocal and unambiguous (see *Wan Sagar Wan Embong v. Harun Taib (No 2)* [2009] 1 CLJ 457 and *Alexander Vincent v. Aden Denong Demong* [2006] 1 LNS 173; [2007] 1 MLJ 432).

[65] The need to strictly comply with the requirement of pleading in an election petition is best explained in the case of *Alexander ak Vincent (supra)*:

Presumably to highlight the need to sufficiently substantiate an election petition, learned counsel quoted the following from *Rahim Khan v. Khurshid Ahmed & Ors* [1974] MLB (Ind) 138:

... An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of *quasi*-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded ...

[66] In his petition at para. 5.1.1 to 5.1.5, the petitioner alleged that certain people named in column E of table 1 had given moneys, ranging from RM50 to RM300, to the persons named in column C of the table as “an inducement or bribery to vote for BN during the Election”. The money was paid on 2 May 2018, 8 May 2018 and 9 May 2018. The persons named in column C are said to be the registered voter for the said constituency “whose respective designated voting centres are SK Sungai Manila or SK Sibuga Besar or SK Nunuyan (as the case may be). It was alleged that the persons who gave the moneys “are/were jointly appointed by the first respondent and one Zakaria bin Mohd Edris @ Tubau through one Datuk Haji Salzo bin Haji Asa.” The moneys were said to have been distributed at various places specified in column B and there were crowds of other voters waiting for their turn to receive the moneys.

- A [67] It was further pleaded in para. 5.1.6 that between 7 May 2018 and 8 May 2018, at the house of one Rafidah binti Daim, the persons named in table 2 were “given and received the sum of RM300 each from the said Rafidah binti Daim who is the “Jalanan Rakyat” (JR) of UMNO, which post is also known as “Ketua 10” UMNO, as an inducement or bribery to vote for UMNO. The persons named in table 2 are the registered voters within the said constituency. The said Rafidah binti Daim was also appointed by the first respondent through the said Datuk Haji Salzo to distribute the money on the first respondent’s behalf “in order to induce the said voters to vote for BN candidate for the said constituency.”
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- C [68] The petitioner also claimed to have personal knowledge that the first respondent had practiced an established system of canvassing for votes by using, giving or distributing money to induce voters to vote for the first respondent since previous general elections to secure his election to the constituency. The first respondent is said to have appointed various people to the post of Pemimpin Kemajuan Rakyat (PKR), Pemaju Mukim, Ketua Pusat Daerah Mengundi, Ketua Cawangan UMNO and Jalanan Rakyat to carry out the various duties and functions within the State Government or UMNO or BN as the case may be. It was further alleged that few days before polling day, these people will be summoned by the first respondent whereupon each of them would be given certain amount of monies to be used to pay the voters who had shown inclination of not supporting the BN.
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- F [69] It must be noted that the petitioner made specific reference to the fact that it was the first respondent through Datuk Haji Salzo bin Haji Asa who had appointed the persons who had distributed the money to the voters at the constituency. It was also stated that the said appointment was made jointly by the first respondent and Zakaria bin Mohd Edris who happen to be the first respondent in Election Petition No. 2/2018. However, as submitted by learned counsel for the first respondent, among others, that there was no mention as to when, where and how did the first respondent and Datuk Zakaria “jointly appoint” the named persons to distribute the money. There was also no mention as to when, where and how did Datuk Haji Salzo appoint the named persons who were supposed to distribute the money. Likewise, there is also no mention as to how, where and when Rafidah was appointed by the first respondent “through” Datuk Haji Salzo bin Haji Asa. As the matter stands, the petitioner is making a vague imputation of bribery by the first respondent without giving any sufficient particulars that would enable the first respondent answer those imputations efficiently. There are also no sufficient particulars that show that Datuk Salzo and Rafidah are the agent of the first respondent. In my opinion, the petitioner has not shown any nexus between the acts of bribery and the first respondent. In this respect,
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- I it was observed by Mohamad Azahar J (as he then was) in *Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors* [2010] 8 CLJ 608 at p. 625 that:

Bearing in mind that a close nexus and direct nexus must be proved between the alleged bribery acts of the 1st respondent and/or his agent, and the persons to whom they were made or addressed to, it will be immediately noticed that all the other charges also suffer similar kind of shortcomings.

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[70] The same issue was raised in the case of *Ahmad Ramzi Mohamad Zubir v. Haji Abdul Hadi Awang & Ors* [2009] 7 CLJ 205 where it was stated that:

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I can accept that the petitioner has pleaded sufficient particulars and grounds that the corrupt or illegal practices had been committed but he has failed to prove sufficient particulars to indicate that the act was committed by the candidate or with his knowledge or consent or by any agent of the candidate. The fact that the act was committed by a person called Mohamad Khalil and his supporters all wearing PAS jacket is insufficient to indicate that the act was committed with his knowledge, consent or by his agent. All that it may indicate at most was that the act may have been committed by the 1st respondent's supporters whose acts he may not have knowledge or control of. The petitioner had also failed to provide sufficient facts and grounds that this person was an agent of the 1st respondent apart from merely making a statement that the corrupt practice or illegal practice was committed by "an agent of the candidate". The Federal Court in *Wan Sagar* had ruled that the principle of agency in Election Law although wider "should not be so extended as to cast the net of agency too wide to include even ordinary party's supporters".

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[71] Likewise, the petitioner's claim that "he has personal knowledge that the first respondent had practiced an established system of canvassing for votes by using, giving or distributing money to induce voters to vote for the first respondent since previous general elections to secure his election to the constituency also" is not supported by any material particulars. The petitioner had failed to at least name the Pemimpin Kemajuan Rakyat, Ketua Pusat Mengundi or the Ketua Cawangan UMNO who had distributed the money to the voters as alleged. It must be noted that the petitioner was at one time worked as a bodyguard to the late Datuk Haji Basrah bin Abdul Rahman who was the Pemimpin Kemajuan Rakyat of the constituency during the previous elections. It would appear from para. 5.1.11 of the petition that the petitioner has met other Pemimpin Kemajuan Rakyat or the Ketua Cawangan UMNO during the previous election. It is safe to infer that, as a bodyguard, he must have accompanied the late Datuk Haji Basrah meeting other persons that had been appointed by the first respondent when the late Datuk Haji Basrah was carrying out his duties. Hence, I do not think that it would be difficult for him to identify, at least, other Pemimpin Kemajuan Rakyat or the Ketua Cawangan UMNO in this petition. As the matter stands, the charge against the first respondent under this heading appears to be vague and incomplete. In the case of *Mohd Zaid Ibrahim (supra)* the court observed as follows:

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Now, the election petition constitutes the charge levelled by the petitioner at the first respondent and /or his agent. If the charges are framed in such a manner that the specific and necessary ingredient of the offence is not

- A clearly brought out in the charges, it becomes vague and defective. This is not to say that the petitioner is required to file a perfect election petition. The charge must be a document setting out the specific accusation made against a person who is entitled to know its nature at the very early stage ... In *Keshav Prasad v. AD Mani* [1961] DEC 133 (MPHC), the High Court of Madhya Pradesh cited the case of *Bhikaji Keshao Joshi & Anor v. Brijlal Nandhal Biyani & Ors* AIR 1955 SC 610, where
- B the Supreme Court of India observed that the requirement of full particulars is one that has got to be complied with sufficient fullness and clarification so as to enable the opposite party fairly to meet them and they must be such as not to turn the inquiry before the tribunal into a rambling and roving inquisition. It all comes back to this. Since the
- C pleadings in relation to s. 32(c) of the Act concerns 'corrupt practice' the requirement of pleadings are strict (see *Wan Sagar Wan Embong v Harun bin Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 and *Dr Shafie bin Abu Bakar v Pegawai Pengurus Pilihanraya N 26 Bangi-Mohd Zakri bin Hj Hissin & Ors and other 20 petitions (No 2)* [2005] 2 MLJ 149; [2005] 5 CLJ 349)
- D [72] In my opinion, the above observation is fully applicable to our present case. The lack of material particulars on the charge of corrupt practice would leave the first respondent guessing the evidence against him, which to a certain extent would affect his defence. I am of the opinion that the petition ought to be dismissed for non-compliance of r. 4(1)(b), and r. 4(2).
- E [73] I will now deal with the objection raised by the second and third respondents. The objection was raised by the learned counsel by way of a letter dated 29 August 2018 on the ground that there are insufficient materials in the petition against the second and third respondents, hence it was submitted that the petition against the second and third respondents are too
- F vague and do not contain material facts required.
- G [74] Learned counsel for the petitioner objected to the mode of raising this objection by letter. It was submitted that the objection should have been raised by way of an application whereby the petitioner would have the opportunity of filing an affidavit in opposition. The Rules does not prescribe any mode of raising preliminary objection. However, sufficient notice must be served on the opponent so that they would have the opportunity to answer any issues raised in the notice. Hence, in the case of *Che Ideris Mat Sin v. Pegawai Pengurus Pilihanraya Kawasan Parlimen P 026 Peringat & Ors (No 1)* [2001] 1 LNS 264; [2000] MLJU 738, the court proceeded to hear the
- H objection raised by the Senior Federal Counsel by way of a letter.
- I [75] In this case, the petitioner was put on notice of the preliminary objection by way of the letter dated 29 August 2018. In that letter, the second and third respondents had particularised the issues that will be raised at the hearing of this application. The issues raised in this letter concern question of law derived from the petition. Further, these issues are quite similar to the issues raised by the first respondent in this application. In my opinion, there will be no prejudice caused to the petitioner if I were to hear the objection.

[76] The petition filed herein has been subjected to close scrutiny by this court and I must agree with the submission by learned counsel that there is nowhere in the petition that the petitioner had shown any wrongdoing by the second and third respondents throughout the election. Based on the petition, I do not see any reason why the second and third respondents should be made parties in this petition. The petition is defective against the second and third respondents and ought to be dismissed.

Conclusion

[77] Based on the reasons aforesaid, I am satisfied that the defects in the petition had resulted in a jurisdictional failure. I allow the application and order that the petition be struck out. Pursuant to s. 36(1)(a) of the Election Offences Act, I hold that the first respondent had been duly returned as the member of the State legislative Assembly N42 Sibuga.

[78] After hearing the parties on the issue of costs, I order that the petitioner to pay costs of RM30,000 to the first respondent and RM10,000 to the second and third respondents.

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